Otsego Mut. Fire Ins. Co. v Dinerman
2017 NY Slip Op 30827(U)
April 20, 2017
Supreme Court, New York County
Docket Number: 158600/2016
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 37

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OTSEGO MUTUAL FIRE INSURANCE COMPANY,

Plaintiff,

- against -

SALLY DINERMAN, IRA DINERMAN, TOWER INSURANCE COMPANY OF NEW YORK and TRAVCO INSURANCE COMPANY,

Defendants.

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Index No. 158600/2016

DECISION, ORDER & JUDGMENT

(Motion Seq. 001 - 003)

ARTHUR F. ENGORON, J.:

Motion sequence numbers 001, 002 and 003 are hereby consolidated for disposition.

This action arises out of a fire that occurred on the evening of March 14, 2014 in the home of defendants Sally and Ira Dinerman, located at 1139 East 13th Street, Brooklyn, New York (the premises). Plaintiff Ostego Mutual Fire Insurance Company (plaintiff or Otsego) issued a homeowner's insurance policy to Sally Dinerman, the record owner of the premises, and paid certain benefits to Sally after the fire. The fire also damaged the adjoining houses on both sides: 1137 East 13th Street, owned by Eric Victor and insured by defendant Travco Insurance Co. (Travelers), and 1141 East 13th Street, another home owned by Sally and insured by defendant Tower Insurance Company (Tower).

In motion sequence 001, plaintiff moves, pursuant to CPLR 3212, for summary judgment in its favor. Otsego seeks a declaration that Sally violated the policy's "Misrepresentation, Concealment or Fraud" condition, contained in paragraph 5 of the policy's general conditions, rendering the policy void in its entirety, such that Sally and her husband Ira, forfeit all policy coverages, payments and benefits, retroactively and prospectively. Otsego also seeks: (1) the

entry of a money judgment against Sally in the amount of $221,104.59, plus pre-judgment interest; (2) a declaration that Otsego has no obligations to defend and indemnify Sally and Ira in connection with a federal subrogation action brought by Travelers on behalf of Eric Victor for damage to his house as a result of the fire; and (3) a default judgment against Tower pursuant to CPLR 3215, declaring that Otsego has no obligation to defend and indemnify Sally and Ira in connection with Tower's subrogation claim or any potential litigation for alleged fire damage to 1141 East 13th Street.

In motion sequence number 002, Travelers moves, pursuant to CPLR 3217 (b), to discontinue this action with prejudice as to Travelers, and for the court to so-order the partially-executed stipulation of discontinuance, which Sally and Ira Dinerman refuse to sign.

In motion sequence number 003, Ira seeks the following relief:

(a) reformation of the policy, so that the paragraph 5 of the policy's general conditions conforms to the requirements of Insurance Law § 3404 (e);

(b) summary judgment declaring that:

(i) the policy is in full force and effect as to Ira;

(ii) Ostego has an obligation to pay Ira the full amount of his property damage claim arising from the fire;

(iii) Otsego is required to defend and indemnify Ira in connection with Traveler's subrogation claim and lawsuit;

(iv) Otsego is required to defend and indemnify Ira in connection with Tower's subrogation claim; and

(v) Otsego is required to reimburse Ira for all attorneys' fees, costs and expenses he has incurred in defense of this action and the subrogation claims/lawsuit; and

(c) pursuant to CPLR 3025(b), for leave to amend Ira's answer.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

The homeowner's policy (No. 292678) issued to Sally insured the premises from September 24, 2011 through September 24, 2014. It provided property and liability coverages up to specified limits, subject to certain terms and conditions. The limit for Coverage A – "Residence Replacement Cost" is $190,000; the limit for Coverage C – "Personal Property" is $95,000; and the limit for Coverage L – "Personal Liability" is $300,000 per occurrence. The policy also included Coverage D – "Additional Living Expense and Loss of Rent" up to a limit of $38,000. Coverage D covered "any necessary and reasonable" living expenses that the insured actually incurred for temporary housing after the fire, but only for "the period of time reasonably required to make the ***insured premises*** fit for occupancy or to settle ***your*** household in new quarters, whichever is less" (Feit aff, Ex. 6 at OTS6780011). The policy defined the word "***Insured***" as "***you*** and, if residents of ***your*** household, ***your*** relatives . . ." (*id.* at OTS678008). In addition, the policy provides: "The words ***you*** and ***your*** refer to the person or persons named in the Declarations and ***your*** spouse if a resident of your household" (*id.*). However, the policy provides that each person who qualifies as an insured under these definitions is "a separate ***insured*** under this policy, but this does not increase ***our*** limit of liability under this policy" (*id.*).

On March 17, 2014, Otsego received notice of the March 14, 2014 fire at the premises. Independent adjuster Al Piazza, of Countyline Adjustment Co., was assigned to represent Otsego in the investigation and adjustment of the loss. Public adjuster Craig Spiegel, of Elite 1-800 Adjusters, represented Sally. From March 19, 2014 to February 5, 2015, at the direction of Otsego claims examiner Mary Brockett, Otsego issued checks totaling $221,104.59, payable to Sally and her designees (Brockett aff, ¶ 4).

After the fire, the Dinermans stayed first with a neighbor, next at a hotel, and then relocated to temporary housing at 1071 East 14th Street in Brooklyn. Otsego issued checks to Sally reimbursing her for these living expenses (Brockett aff, ¶¶ 9-12). Otsego contends that Sally then intentionally concealed material information and misrepresented material facts in order to obtain additional living expense payments in excess of the additional living expenses that were actually incurred. On September 15, 2014, Ira and Sally allegedly began occupying the house at 1141 East 13th Street, which Sally also owned. However, after they ceased occupying temporary rental housing, Otsego contends that the undisputed evidence establishes that Sally submitted counterfeit rent receipts for the period from October 2014 through March 2015.

Sally submitted handwritten rent receipts to Otsego's adjuster for October and November of 2014 (Brockett aff, ¶ 13; Feit aff, Exs. 17 & 19). By the submission of these rent receipts, Sally represented that she had paid $950 per month to the owner of 1071 East 14th Street, Brooklyn, New York, for two months of temporary housing at that address. In reliance on these rent receipts, Otsego sent a check payable to Sally in the amount of $1,900, and Sally negotiated this check (Brockett aff, ¶ 13; Feit aff, Ex. 20). Sally then submitted rent receipts to Otsego's adjuster for December 2014, and for the first three months of 2015 (Brocket aff, ¶¶ 14-17; Feit aff, Exs. 20, 21). By this second group of rent receipts, Sally represented that she had paid $1,500 per month for each of those four months to Ruth Ofer to temporarily occupy her apartment at 2785 West Fifth Street, Brooklyn, New York (*id.*). It is undisputed that Ruth Ofer is a close personal friend of Sally. Otsego paid Sally $4,500, but withheld reimbursement for the March 2015 rent, after its claims examiner became concerned about where the Dinermans actually lived and requested an investigation (Brockett aff, ¶¶ 17-18). This concern arose

because the postal service had sent notices to Otsego reporting that mailings addressed to Sally at the premises had been forwarded to her at 1141 East 13th Street (*id.*).

The independent claims adjuster was sent to that address to investigate on March 17, 2015 (Piazza aff, ¶ 9). Ira answered the door. Mr. Piazza was allowed to enter the house, and observed that it was occupied as a residence (*id.*). Ira admitted to Mr. Piazza that he and Sally had been residing there since September 15, 2014 (*id.*). Ira also advised Mr. Piazza that Sally sold the premises to a third party in November 2014 (*id.*). Thus, as of that date, the Dinermans had no expectation of resuming residency in their old home.

Otsego thereafter forwarded the claim to counsel for further investigation. By letter dated March 31, 2015, Otsego's attorney demanded that both Sally and Ira: (1) submit, within 60 days of the letter, a sworn statement in proof of loss in connection with their claims for household contents, additional living expenses and all other open, pending or unpaid claims arising out of the March 2014 fire; (2) testify at an examination under oath (EUO) at the attorney's office on May 4, 2015; and (3) produce various listed documents (Feit aff, Ex. 5).

On or about April 13, 2015, Sally sent a handwritten letter to the attorney for Otsego. The letter states: "A discrepancy was noted in the funds collected. Refund enclosed." A check in the amount of $6,500, made payable to Otsego, was enclosed for living expenses after September 15, 2014 (Feit aff, Ex. 25).

The EUO's were held on May 28, 2015. The Dinermans appeared represented by counsel. Ira testified that he and Sally were both living at 1141 East 13th Street since September 15, 2014, but that Sally stayed overnight with friends for one or two days here and there (Ira's EUO at 12, 32, 36).[1] Ira was questioned about the visit from Otsego's claims adjuster. Ira testified that he told Mr. Piazza that he had been living at 1141 East 13th Street since September

[1] A full copy of Ira's EUO transcript is attached to the Feit supporting affidavit as Exhibit 8.

15, 2014, and that if Sally was claiming that she was living elsewhere, "That's a lie." (*id.* at 41-42).

Sally also testified that she had been living at 1141 East 13th Street since September 15, 2014 (Sally's EUO at 16-17, 19, 35, 85, 92-93, 101).[2] She admitted that she did not pay her friend Ruth Ofer $1,500 for the month of December 2014, even though she submitted a rent receipt for that amount (*id.* at 97). Sally then feigned not to know the purpose of an identical receipt for the month of January 2015 (*id.* at 97-100). When asked if she paid Ms. Ofer $1,500 rent for January 2015 or March 2015, she claimed she could not remember (*id.* at 99-100, 111-112). However, Sally squarely admitted that she did not pay Ms. Ofer $1,500 rent for February 2015 (*id.* at 107). When asked about her attempt to refund the amount of $6,500 for living expenses after September 15, 2014, Sally admitted she had been overpaid by Otsego (*id.* at 132-133). When pressed by counsel for Otsego, Sally testified:

> Q. So you knew that you did something wrong, didn't you Mrs. Dinerman?
>
> A. I didn't think it was right.

(*id.* at 135).

Otsego commenced this action on August 19, 2015. The complaint alleges that Sally's submission of counterfeit rent receipts, and her endorsement of the checks totaling $6,500, violated paragraph 5 of the policy's general conditions. This provision states:

> "5. ***Misrepresentation, Concealment or Fraud*** – This entire policy is void if, whether before or after a loss:
> a. An ***insured*** has willfully concealed or misrepresented:
> 1) any material fact or circumstance concerning this insurance; or
> 2) an ***insured's*** interest herein.
> b. There has been fraud or false swearing by an ***insured*** regarding any matter relating to this insurance or the subject thereof."

(Feit aff, Ex. 6 at OTS6780017).

[2] A full copy of Sally's EUO transcript is attached to the Feit supporting affidavit as Exhibit 7.

On September 10, 2015, Ira, appearing as a self-represented litigant, filed a handwritten answer, in which he states:

> "I was neither the owner of 1139 E 13 Street, which sustained severe damage from fire nor the holder of the fire insurance policy with Oswego [sic]. Therefore, I deny all the charges made against me. Please dismiss me from this case; I am in no way involved other than being the husband of Sally Dinerman."

(NYSCEF Doc. 8). Sally submitted a separate handwritten answer on September 16, 2015, also without the benefit of legal counsel. As best as the court can decipher from the handwriting, she states, in pertinent part:

> "Received Th082815 personally. _____ It is unexpected + vicious thus would be an unconscionable + _____ victory. I deny all the charges. Please dismiss this case forthwith. I owed $0 to OMFIC. OMFIC still owes me $70 to $60K ___ outstanding on contends From 031414 Fire. I am the defendant OMFIC is the plaintiff. Please award me atty fee 5K$ + if any Damages apply for harassment, not acting in good faith or a timely _____ to close this case #292678 for fire 031414 ____."

(NYSCEF Doc. 10). Although neither the complaint nor the answers filed by the Dinermans assert any direct claims against Travelers or Tower, Travelers filed an answer to the complaint on October 28, 2015, generally denying knowledge or information to form a belief as to the truth or falsity of Otsego's allegations. Tower was served on or about August 26, 2015, but has not appeared or answered the complaint. Tower also does not appear to be proceeding with the subrogation claim that it initially made in correspondence to Otsego dated October 15, 2014.

Otsego served notices to admit the accuracy of their EUO transcripts in March of 2016. Ira responded on March 11, 2016, stating, in pertinent part:

> "I received the copy of the transcript of my testimony given in response to Mr. Feit [plaintiff's counsel]. I have found two instances of incorrect information: Mr. Feit stated that I owned 1139 E 13 Street, and that I had an insurance policy with the Oswego company. This is not so."

(Feit aff, Ex. 13). Sally responded by stating: "I have no counsel. I deny allegations in notice to admit" (*id.*, Ex. 12).

Plaintiff Otsego filed the instant motion for summary judgment in April 2016. Ira retained counsel, who filed a notice of appearance on June 2, 2016 and filed motion sequence number 003 on his behalf. In his affidavit in support of his motion, Ira avers that, at the time he answered the complaint, he was unaware of his rights as an "innocent coinsured" under the policy, and was "naïve and uninformed" (Ira Dinerman aff, ¶ 27). He further claims that he is a 68-year old retiree with no prior experience in the legal system; and avers that once he realized he was in over his head, he contacted an attorney, and, begs the court for leave to file an amended answer, which he claims will not prejudice or surprise Otsego.

DISCUSSION

The first issue is whether Otsego has demonstrated its entitlement to summary judgment, as a matter of law, on its claim that Sally violated the policy's "Misrepresentation, Concealment or Fraud" condition.

The proponent of a motion for summary judgment is required to make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to demonstrate that material issues of fact exist which require a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The Dinerman's sworn EUO testimony about the rent receipts that Sally submitted for the period of October 2014 through March 2015, after both, admittedly, were residing at the

home Sally owned next door at 1141 East 13th Street, establishes a prima facie case of fraud by Sally. Sally has made several submissions in opposition to Otsego's motion for summary judgment (*see* NYSECF Docs. 59, 60, 62, 72-91, 97). The majority of her submissions are virtually impossible to follow or place in proper order. While notary stamps appear throughout the submissions, it is impossible to discern what part, if any, of the opposing papers are supposedly sworn to, or affirmed, as true. However, it appears that Sally is arguing that: (i) the relief Otsego is seeking is draconian in relation to what she did; (ii) all of the receipts that she submitted for temporary housing were valid receipts showing actual payments to the owners of those two apartments; and (iii) Sally actually used temporary housing between October 2014 and March 2015 for a proper purpose, namely, her comfort under trying circumstances.

Sally's submissions fail to raise a triable issue of fact with respect to the fraudulent rent receipts. First, with one exception, Sally has not submitted any evidence in admissible form to contradict her and Ira's prior sworn testimony. Indeed, even if her submissions were in proper affidavit form,[3] "[a] party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002], citing *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000], and *Kistoo v City of New York*, 195 AD2d 403, 404 [1st Dept 1993]; *see also Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007]; *Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327, 327–328 [1st Dept 2006]).

The only fully legible sworn statement is a typewritten affidavit from Ruth Ofer, sworn to on June 16, 2016. Ms. Ofer avers that Sally told her in November 2014 that, even though she

[3] New York law does not afford a self-represented litigant additional benefits, to the detriment of another party, absent a reasonable explanation supported by the record of why such additional benefits are warranted (*Perez v Time Moving & Stor.*, 28 AD3d 326, 329 [1st Dept 2006]).

was living "on and off" at 1141 East 13th Street, "that property had been damaged by the fire and was not complete" (Ofer aff, ¶ 2). Ms. Ofer then offered to let Sally stay at her apartment anytime, but Sally insisted on paying rent, and Sally did, in fact, pay Ms. Ofer $6,000 for the month of December 2014, and for the first three months of 2015 (*id.*, ¶ 4). Even if this affidavit does serve to contradict Sally's prior sworn testimony, that she did not actually pay any money to Ms. Ofer, this affidavit does not raise a question of fact sufficient to defeat summary judgment in Otsego's favor on its fraud claim against Sally. First, the Ofer affidavit does not contradict the evidence that the Dinerman household had been settled in new living quarters as of September 15, 2014. Sally testified that she made a claim against Tower for smoke damage to 1141 East 13th Street as a result of the fire; that Tower paid her $70,000 on that claim, which she used to make repairs; and that the house "was livable" at the time that she and Ira moved in (Sally's EUO at 35-36, 86). Second, the Ofer affidavit does not create an issue of fact regarding the fraudulent nature of the rent receipts that Sally submitted for October and November 2014. There is no evidence that Sally or Ira resided at 1071 East 14th Street after September 2014; Sally could not produce copies of the checks that she claimed she wrote to the landlord, Moshe Keherim, for those months; and the written lease for that space expired at the end of September 2014. Otsego has established that the named insured, Sally, willfully concealed the fact that her household was settled in new quarters as of September 15, 2014, and was no longer in need of reimbursement of funds for "necessary and reasonable" living expenses that the insured and her spouse actually incurred for temporary housing.

The second issue is whether this proof of insurance fraud by Sally justifies the relief sought by Otsego, namely, a declaration that the policy is void, and that the Dinermans must forfeit all policy coverages, payments and benefits. As to Sally, the answer is yes (*Latha Rest.*

Corp. v Tower Ins. Co., 38 AD3d 321 [1st Dept 2007]; *Chubb & Son v Consoli*, 283 AD2d 297, 299 [1st Dept 2001]; *Somerstein Caterers of Lawrence v Insurance Co. of State of Pa.*, 262 AD2d 252 [1st Dept 1999]; *Astoria Quality Drugs v United Pac. Ins. Co. of N.Y.*, 163 AD2d 82 [1st Dept 1990]). As to Ira, the answer is more complicated.

Ira argues that Sally's fraud cannot be imputed to him, since Otsego concedes that he had no knowledge of, and did not participate in, the fraud. As an innocent coinsured, Ira maintains that he is entitled to full coverage, because Otsego's policy does not comply with the requirements of Insurance Law § 3404 (e) and 3404 (f) (1) (A).

There is no question that Ira, as Sally's husband and a resident of the premises at the time of the fire, was a coinsured under Otsego's policy. The Court of Appeals has upheld the right of an innocent property owner to recover on a fire insurance policy where the fire was caused by the willful misconduct of another insured (*Reed v Federal Ins. Co.*, 71 NY2d 581, 587-589 [1988]). The New York standard fire insurance policy is codified in Insurance Law § 3404 (e). The standard provision, entitled "Concealment, Fraud," states:

> "This entire policy is void if, whether before or after a loss, ***the insured*** has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by ***the insured*** relating thereto"

(Insurance Law 3404 [e] [emphasis added]). The Otsego policy differs from this statutory language by the use of the words "an insured," instead of "the insured." As such, it offers Ira, an innocent party, significantly less coverage than the statutory language. This is a violation of Insurance Law § 3404 (f) (1) (A), which requires that all fire insurance policies written in New York contain "terms and provisions no less favorable to the insured than those contained in the standard fire policy." The Court of Appeals has squarely ruled that an insurance company's use of the words "an insured" in its fire insurance policies, as the Otsego policy does, as opposed to

"the insured," violates Insurance Law § 3404 (e)'s requirement that all fire insurance policies offer the level of coverage provided in the standard policy (*Lane v Security Mut. Ins. Co.*, 96 NY2d 1, 5 [2001]). Ira, as an innocent coinsured, may not have his fire insurance coverage voided due to his wife's fraud. Otsego's attempt to distinguish *Lane,* on the ground that Ira was not a "named insured" and only an insured based on the definitions section of the policy, is unavailing.

However, the Court of Appeals expressly limited the innocent coinsured doctrine to fire insurance coverage, which is governed by Insurance Law § 3404, and held that it has no relevance to liability insurance coverage (*Lane v Sec. Mut. Ins. Co.*, 96 NY2d at 6). "There is no statutory requirement for the full panoply of coverages known as homeowner's insurance and hence 'no prohibition against such insurers limiting their contractual liability'" (*Slayko v Sec. Mut. Ins. Co.*, 98 NY2d 289, 295 [2002], quoting *Suba v State Farm Fire & Cas. Co.*, 114 AD2d 280, 284 [4th Dept 1986]).

The Otsego policy provides that the entire policy is void if "an insured" has willfully concealed or misrepresented any material fact or circumstance concerning the insurance or if there is fraud or false swearing by an insured regarding any matter relating thereto. Sally, the named insured, committed insurance fraud. The entire policy is void, except for the fire insurance coverage to Ira as an innocent coinsured. Otsego's motion for summary judgment, on its claim for a declaration that Otsego has no duty to defend or indemnify either Sally or Ira in connection with Traveler's subrogation claim and federal lawsuit, is granted. Although Tower does not appear to be pursuing a subrogation claim against either Sally or Ira at this time, Otsego is entitled to a similar declaration.

While the fire insurance coverage provisions of the Otsego policy cannot be voided vis-a-vis Ira due to Sally's fraud, Ira's argument, that Otsego is obligated to pay him the full amount of his property damage claim arising from the fire, is rejected.

The Dinermans have consistently testified under oath, and professed in numerous writings, that Sally is the sole owner of the premises (Sally's EUO at 23; Ira's EUO at 25; Feit aff, Exs. 3, 13, 41, 42). Ira now avers, in support of his motion for summary judgment, that he and Sally purchased the premises in 1992, but, at Sally's request, title to the house was put in her name alone (Ira Dinerman aff, ¶ 3). He further contends that all of the furniture, fixtures, equipment and other personal property that were destroyed by the fire were jointly acquired by he and Sally over the course of their 22-year marriage (*id.*, ¶ 4). Therefore, Ira contends that he owns an actual and/or equitable undivided one-half interest in both the house and its contents (*id.*, ¶ 14), and, as such, is legally entitled to coverage under the terms of the policy's fire coverage (*id.*, 15). If the court allows Otsego to recover back the insurance proceeds that were payable to Sally, Ira argues that those insurance proceeds should be awarded to him, based upon his insurable interest in the premises and its contents. This assumes that Otsego actually recovers back some of the $190,000 it paid to Sally pursuant to Coverage A, since the policy limits on that coverage have been exhausted, and the policy makes plain that there is a single $190,000 limit under Coverage A, no matter how many insureds make a claim.

As stated above, there is no dispute that Ira was a coinsured under the policy. Whether or not his name appears on the deed to the premises is a non-issue. There is no question that Ira had an insurable interest in the premises, and *could have* filed a claim for coverage under the policy. But the plain fact of the matter is that Ira *did not* file a timely claim under the policy, and his time to file a sworn statement in proof of loss has long since expired.

The Otsego policy included a condition requiring submission by the insured of "acceptable proof of loss, within 60 days after ***our*** request" (Feit aff, Ex. 6 at OTS6780015). By his March 31, 2015 letter, Otsego's attorney demanded that both Sally and Ira submit a sworn statement in proof of loss in connection with their claims for household contents, additional living expenses and all other open, pending or unpaid claims arising out of the March 2014 fire. Two blank sworn statements were enclosed, and the Dinermans were advised that these statements must be submitted to Otsego's counsel within 60 days of their receipt of the letter.

Ira did not submit a sworn statement of proof of loss within 60 days of Otsego's letter demand, or at any time thereafter. The only person to submit a sworn proof of loss with respect to the fire was Sally. On December 8, 2014, she submitted a sworn proof of loss claiming a loss of $190,000, less the $500 deductible, for a net claim of $189,500 under Coverage A (Feit aff, Ex. 41). In this statement, Sally swore that she was the owner of the premises, and that "no other person, persons or entity has or claims any interest therein or encumbrance thereon, nor does any person have or claim a right to, title to, claim to, or interest in or otherwise in the insurance proceeds of this loss" (*id.*). In a second sworn proof of loss statement dated May 28, 2015, Sally sought reimbursement, under Coverage C, for the loss of "furniture, furnishings, clothing, personal effects, artwork, etc." in the amount of $60,000, less a $20,000 advance (*id.*, Ex. 42). Sally also swore, for a second time, that she was the owner of the premises, and that no other person had any interest in the premises (*id.*).

Any rights to property insurance coverage that Ira may have possessed under the Otsego policy came into existence upon the occurrence of the March 14, 2014 fire. Upon receipt of the March 31, 2015 letter, Ira was required to submit his proof of loss within 60 days, but failed to do so.

> "When an insurer gives its insured written notice of its desire that proof of loss under a policy of fire insurance be furnished and provides a suitable form for such proof, failure of the insured to file proof of loss within 60 days after receipt of such notice, or within any longer period specified in the notice, is an absolute defense to an action on the policy, absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense"

(*Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 209–10 [1984]). The court cannot rewrite the terms of the Otsego policy and allow Ira to file a late proof of loss at this juncture, as it would be highly prejudicial to Otsego. *Della Porta v Hartford Fire Ins. Co.* (118 AD2d 1045 [3d Dept 1986]), upon which Ira relies for the argument that Sally's proof of loss submissions are sufficient to satisfy his own policy obligations, is factually distinguishable. In that case, the court merely held that the fact that the wife (and business partner in a general store and named insured) did not sign the notarized letter sent by her husband-partner, describing their burglary loss, was not sufficient to deny her coverage under the policy. However, there was no question that both the husband and wife, both of whom were named insureds under the policy, were making a claim for the burglary loss.

For these reasons, Otsego's motion for summary judgment is granted. Ira's motion for summary judgment and to amend his answer is denied. Travelers' motion, for discontinuance of the action as against it pursuant to CPLR 3217 (b), is granted. None of the pleadings assert claims against Travelers, and it was named as a defendant solely as an interested party in order to bind the company to any final judgment entered in this action relating to Otsego's coverage obligations under the Otsego policy. Travelers has agreed to this condition in the partially-executed stipulation of discontinuance, which was signed by both counsel for Otsego and Travelers (*see* Eagle affirmation, Ex. E).

CONCLUSION, ORDER AND JUDGMENT

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment in its favor (mot. seq. no. 001) is granted to the extent that it is:

ADJUDGED and DECLARED that defendant Sally Dinerman violated the "Misrepresentation, Concealment or Fraud" condition of Policy 292678, rendering said policy void in its entirety as to Sally Dinerman, who must forfeit all policy coverages, payments and benefits, retroactively and prospectively; and it is further

ADJUDGED and DECLARED that defendant Sally Dinerman violated the "Misrepresentation, Concealment or Fraud" condition of Policy 292678, rendering said policy void as to Ira Dinerman, an innocent coinsured, with the exception of the fire insurance coverage (Coverage A and C); and that Ira Dinerman's failure to file a timely proof of loss is an absolute defense to his claim for fire insurance coverage as a result of the March 14, 2014 fire at 1139 East 13th Street, Brooklyn, New York; and it is further

ADJUDGED and DECLARED that plaintiff Otsego Mutual Fire Insurance Company has no obligation to defend and indemnify Sally Dinerman or Ira Dinerman under Policy 292678, in connection with the subrogation action, brought on behalf of Eric Victor for damage to 1137 East 13th Street, Brooklyn, New York, entitled *Travco Insurance Co. a/s/o Eric Victor v Sally Dinerman, et al.,* ED NY, No. 16-CV-1064 (RRM); and it is further

ADJUDGED and DECLARED that defendant Tower Insurance Company of New York is in default of appearing in this action, and that plaintiff Otsego Mutual Fire Insurance Company has no obligation to defend and indemnify Sally Dinerman or Ira Dinerman under Policy 292678, in connection with any subrogation claim brought by defendant Tower Insurance

Company on behalf of Sally Dinerman for damage to 1141 East 13th Street, Brooklyn, New York; and it is further

ADJUDGED that plaintiff Otsego Mutual Fire Insurance Company, with offices at 143 Arnold Road, Burlington Flats, New York 13315, do recover from defendant Sally Dinerman, residing at 1141 East 13th Street, Brooklyn, New York 11230, the amount of **$221,104.59** plus pre-judgment interest from February 5, 2015 in the amount of $_____ as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of a bill of costs in the amount of $_____, for a total judgment amount of $_____, and that plaintiff shall have execution therefor; and it is further

ORDERED that the motion of defendant Travco Insurance Company (mot. seq. no. 002), to discontinue this action with prejudice, is granted upon condition that this defendant will abide by and be bound by this final judgment, after the exhaustion of all appeals; and it is further

ORDERED that defendant Ira Dinerman's motion for summary judgment and/or to amend his answer (mot. seq. no. 003) is denied.

Dated: April 20, 2017

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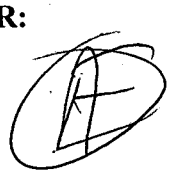

J.S.C.

HON. ARTHUR F. ENGORON

ENTER:

Clerk of the Court